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8. Appeal and Error (§ 1032 (1)*)—Review—Reversal.—An appellate court will not reverse the decree of a trial court, unless satisfied that it is wrong; the burden being upon the party complaining to show error.

Sims, J., dissenting.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 581, 582.]

Appeal from Circuit Court of City of Norfolk.

Suit by the Cook & Bernheimer Company and others against Alvilla Morrisette. Judgment for complainants, and defendant appeals. Affirmed.

N. T. Green and *Thos. H. Willcox, Jr.*, both of Norfolk, for appellant.

G. M. Dillard and *Alfred Anderson*, both of Norfolk, for appellees.

CHESAPEAKE & O. RY. CO. OF INDIANA NATIONAL BANK
OF COMMERCE OF NORFOLK.

March 21, 1918.

[95 S. E. 454.]

1. Carriers (§ 108*)—Carriage of Freight—Contracts.—In every case of an action for damages for breach of contract or breach of duty by a common carrier of freight to carry it safely, whether in assumpsit on the contract, or in tort for breach of duty, the right of action is dependent on the existence of a contract of carriage between plaintiff and the carrier when the alleged cause of action arose, which contract need not have been express, but may have arisen from the duty imposed at common law or by statute, state or federal, in which case the contract will be implied in law from the duty.

[Ed. Note.—For other cases, see 2 Va.-W. Va. Enc. Dig. 678.]

2. Commerce (§ 8 (12)*)—Carriage of Freight—Interstate Shipment—Interstate Commerce Act.—Congress having occupied the whole field of interstate commerce by virtue of the Interstate Commerce Act and its amendments, such statutes have superseded all state legislation on the subject, and they and their construction alone must be looked to in ascertaining the rights of the parties litigant in all actions involving an interstate shipment.

[Ed. Note.—For other cases, see 7 Va.-W. Va. Enc. Dig. 877.]

3. Carriers (§ 177 (4)*)—Carriage of Freight—Liability of Initial Carrier—Subsequent Contract—Interstate Commerce Act.—Under the Interstate Commerce Act (Act Feb. 4, 1887, c. 104, 24 Stat. 379), as amended by the Carmack Amendment (Act June 29, 1906, c. 3591,

*For other cases, see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

§ 7, pars. 11, 12, 34 Stat. 594), and the Cummins Amendment (Act March 4, 1915, c. 176, 38 Stat. 1196, as amended by Act Aug. '9, 1916, c. 301, 39 Stat. 441 [U. S. Comp. St. 1916, §§ 8604, 8604aa]), if an interstate shipment of freight is begun under an express contract of carriage between the initial carrier and the shipper, and subsequently a connecting carrier on the route of the shipment beyond the terminal of the initial carrier issues another contract of carriage to the shipper for a remaining portion of the original route, and takes up the original bill of lading evidencing the original contract, upon its surrender by the shipper the second contract of carriage does not supersede the first, which remains in force by virtue of the federal statute law, and the shipper and all assignees claiming through him, all of whom could have enforced the original contract, have no right of action for damages against the subsequent carrier, but only against the initial carrier.

[Ed. Note.—For other cases, see 2 Va.-W. Va. Enc. Dig. 683.]

4. Carriers (§ 177 (3)*)—Carriage of Freight—Liability of Initial Carrier—Subsequent Contract.—The same result would follow if the initial contract of carriage were not an express contract, but one implied in law, because of the duty imposed by the federal statute, where the initial carrier received the shipment for interstate transportation to a destination beyond the terminal of its line.

[Ed. Note.—For other cases, see 2 Va.-W. Va. Enc. Dig. 683.]

5. Carriers (§ 177 (4)*)—Carriage of Freight—Interstate Commerce Shipment—New Initial Carrier.—If the initial contract of carriage covering an interstate shipment was invalid as a contract of carriage east of Chicago, then a second contract might be made by a connecting carrier subjecting it to the liability, under the Interstate Commerce Act, as amended, of an initial carrier.

[Ed. Note.—For other cases, see 2 Va.-W. Va. Enc. Dig. 683.]

6. Carriers (§ 209*)—Interstate Carriage of Live Stock—Tariff Regulation.—The Interstate Commerce Act of 1887, as amended by the Carmack Amendment of 1909, and the Cummins Amendment of 1915, as amended by Act Aug. 9, 1916, did not prohibit a tariff regulation prohibiting the movement of live stock on shipper's order contract, that is, on an order notify bill of lading, east of Chicago, the regulation applying to all carriage of live stock freight on the lines of all common carriers east of Chicago; such regulation, though it incidentally breaks, interrupts, and stops an originally intended through and continuous shipment of live stock freight from points west of Chicago to points east, is not forbidden, because section 7 of the act (U. S. Comp. St. 1916, § 8571) permits a break in good faith for a necessary purpose and without intent to avoid or unnecessarily interrupt the continuous carriage or to evade the provisions

*For other cases, see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

of the act, and the first carrier east of Chicago is the initial carrier within the commerce act.

[Ed. Note.—For other cases, see 2 Va.-W. Va. Enc. Dig. 691.]

7. Carriers (§ 219 (5*))—Carriage of Live Stock—Implied Contract.—If no express contract had been made with a railroad covering a shipment of live stock, and the stock had been received by it for transportation, the facts would have constituted it the initial carrier within the Interstate Commerce Act, as amended, for the entire route to destination beyond its own lines, and the railroad could alone have been sued for damage to the shipment, despite any subsequent contract of carriage made between the consignee and an intermediate connecting carrier.

[Ed. Note.—For other cases, see 2 Va.-W. Va. Enc. Dig. 691.]

8. Carriers (§ 219 (5*))—Carriage of Live Stock—Interstate Shipment—Initial Carrier—Liability.—An initial carrier of an interstate shipment of live stock under the Interstate Commerce Act, as amended, was liable for injury and damage to the shipment due to the negligence or fault in duty of itself or of some connecting carrier.

[Ed. Note.—For other cases, see 2 Va.-W. Va. Enc. Dig. 683, 691.]

9. Carriers (§ 185 (1*))—Carriage of Freight—Loss of Inanimate Goods.—At common law, on proof merely of delivery to a common carrier of inanimate goods for transportation, and proof of their nondelivery, the law implies that they have been lost by the negligence of the common carrier, or by reason of some cause for which it is responsible, and plaintiff, suing for such loss, is relieved of the burden of proof, a rule applying to the initial carrier of inanimate goods under the Interstate Commerce Act, as amended.

[Ed. Note.—For other cases, see 2 Va.-W. Va. Enc. Dig. 683, 717.]

10. Appeal and Error (§ 997 (2*))—Review—Demurrer to Evidence—Admission.—Where the evidence for defendant tending to bring the case within an exception to a common-law rule of liability was in conflict with the evidence for plaintiff tending to show a contrary state of fact, the evidence for defendant was waived by its demurrer to evidence, and cannot be considered by the Supreme Court of Appeals.

[Ed. Note.—For other cases, see 4 Va.-W. Va. Enc. Dig. 527.]

11. Carriers (§ 163*)—Carriage of Freight—Exception in Contract—Burden of Proof.—The burden of proof is on the carrier sued for injury to inanimate freight to prove that the injury to the freight falls within an exception from liability contained in the special contract covering the shipment relied on by the carrier.

[Ed. Note.—For other cases, see 2 Va.-W. Va. Enc. Dig. 685, 717.]

12. Courts (§ 97 (1*))—Construction of Federal Law Followed.—The liability of a carrier for damage to an interstate shipment of

*For other cases, see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

freight is covered by the Interstate Commerce Law, as amended, and the common-law rules applicable thereto as accepted and applied in federal tribunals must govern.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 402.]

13. Carriers (§ 228 (2)*)—Carriage of Live Stock—Interstate Shipment—Burden of Proof.—The federal rule is that in case of injury to an interstate shipment of live stock, where a contract exception is relied on as a defense by the carrier, the burden of proof at least is on the carrier in two particulars—first, to prove that when the injury may have occurred the special contract exception was in operation; second, that the injury was of such a nature that it may have been occasioned by causes within the contract exception, certainly where plaintiff's proof shows the injury was due to human agency.

[Ed. Note.—For other cases, see 2 Va.-W. Va. Enc. Dig. 693, 717.]

14. Appeal and Error (§ 997 (2)*)—Review—Demurrer to Evidence—Conflicting Evidence.—On demurrer to evidence, conflicting evidence can not be considered by the Supreme Court of Appeals.

[Ed. Note.—For other cases, see 4 Va.-W. Va. Enc. Dig. 527, 533.]

15. Trial (§ 156 (3)*)—Demurrer to Evidence—Admission.—Defendant's demurrer to plaintiff's evidence admits the facts which such evidence tends to establish.

[Ed. Note.—For other cases, see 4 Va.-W. Va. Enc. Dig. 523.]

(Additional Syllabus by Editor.)

13½. Demurrer to the Evidence—Consideration of Evidence—Conflicting Evidence.—In an action against a carrier for damages to live stock in the course of transportation, where there was ample evidence for the plaintiff to establish the fact that the injury to the stock complained of was due to human agency, the Supreme Court must consider such as the fact upon defendant's demurrer to the evidence, although there was evidence for the defendant to the contrary.

[Ed. Note.—For other cases, see 4 Va.-W. Va. Enc. Dig. 527, 533.]

Action by the National Bank of Commerce of Norfolk against the Chesapeake & Ohio Railway Company of Indiana. To review a judgment for plaintiff, defendant brings error. Affirmed.

D. H. & Walter Leake and Henry Taylor, Jr., all of Richmond, for plaintiff in error.

Tazewell Taylor, of Norfolk, for defendant in error.

*For other cases, see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.